REVIEWS

THE RISE OF LIBERALISM: THE PHILOSOPHY OF A BUSINESS CIVILIZATION. By Harold J. Laski.[1] New York: Harper and Brothers, 1936. Pp. 327. $3.50.

ORDINARILY, it is the business men who are either contemptuous or fearful of liberalism. But here we have disparagement and warning from another source. If Mr. Laski's historical appraisal of liberalism is valid, the business men have been very unbusiness-like in their appraisals. In identifying liberalism, Mr. Laski specifies important ideas that are usually associated with the term. He then declares that these ideas do not exhibit the real nature and significance of liberalism. Essentially, he holds, liberalism is the "philosophical justification" of capitalism. During the period between the Reformation and the French Revolution "new material conditions" were creating "new social relationships." The latter needed a "new philosophy." Liberalism has supplied that need. The philosophy consists, for the most part, of the following: the assumption of a natural order of society, governed by laws discoverable through reason, observation and experiment; rationalistic and "scientific" reasoning in the determination of political questions; a belief that state activity in the field of economic affairs is essentially "unnatural"; a general commendation, therefore, of economic freedom and individual initiative and a general disapproval of governmental regulation; a defense (within limits) of religious toleration and freedom of inquiry. What "produced" these ideas was "the emergence of a new economic society"—i.e., industrial capitalism. Liberalism is "in its essence" the outlook of an economic class. "The liberty of liberalism is set in the context of property."

The book traces historically these congenial relations between liberalism and capitalism, from the seventeenth century to the present. Liberal attacks on ecclesiastical privileges were "popular" in seventeenth-century England because of the opportunity that the abolition of privileges "opened up to the King, the nobility and the upper classes for self-enrichment." Although French liberal theorists of the eighteenth century demanded "the emancipation of the whole nation . . . when they applied themselves to the details of their program, their theory limited its range to the freedom sought by men of property." Religious toleration came "because, at bottom, persecution is a threat to property" and "endangers the conditions of sound business enterprise." "It was, indeed, above all its cost that was the ruin of religious persecution." The seventeenth and eighteenth-century attempts at a scientific understanding of nature were stimulated chiefly by the problems of business men, who "in their search for wealth . . . required new power over nature." Liberals found in nature the "natural form of government" that disclosed "the principles commercial prosperity demands." Liberals took a negative attitude toward government, chiefly in order that government should not despoil subjects of their property. Free speech, as liberals have stood for it, has usually meant freedom to say what business men want said. In general, therefore,

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liberals have advocated freedom in order that property and property-owners might be free.

In some passages Mr. Laski appears to regard liberals as knowing just what they are doing. Men who have opposed the efforts to establish, through law, decent standards of education, health, housing and working conditions, have acted as true liberals. For it is "inherent" in liberalism to want to keep the working-classes in "their proper place"; and it is "always" the tendency of liberalism to regard "the poor as men who have failed through their own fault." Yet many notable figures, who have been generally called liberals, have had very different desires and attitudes in reference to working men and the poor. They have set a greater value on preserving freedom of inquiry and on advancing the welfare, increasing the freedom and raising the social status of workingmen and tenants than on increasing the wealth or protecting the social and political superiority of business men. Mr. Laski, unable to overlook such men altogether, admits that there are some "generous minds" among liberals: exceptional men, such as T. H. Green and L. T. Hobhouse. But how can he concede the term "liberal" to these men? They are not only deliberately trying to promote an end which both they and business men regard as being opposed to what Mr. Laski has characterized as the "essential" objective of liberalism—namely, protection of the superior claims of property-owners. They are also abandoning a method which Mr. Laski has characterized as "inherent" in the policy of liberalism—namely, governmental non-intervention in economic affairs. In what way are they liberal? Mr. Laski's answer is that they are liberals because they really are, indirectly and unintentionally, supporting capitalism—by persuading or driving it into making the concessions that are necessary to save it from destruction. He says that liberalism is generally "unconscious" of what it is doing.

I don't believe that Mr. Laski's argument is valid. I don't believe that the policies advocated by liberals have been prevailingly of more benefit to property-owners than to wage-earners and others on the lower economic levels. And even when these policies do help capitalists, I don't believe that it is correct to call liberalism the philosophy of a business civilization. I doubt the propriety of interpreting a philosophy in terms of what a writer thinks that philosophy "unconsciously" leads to. Some writers believe that the advocacy of socialist measures often plays into the hands of capitalists. I don't believe that such writers, however honest and thoughtful they are in that belief, would be justified, by their own judgment or by that of others, in calling socialism the philosophy of a capitalist civilization.

Mr. Laski, I believe, should have made his sub-title the main title of his book; or he should have called it "The Rise of Economic Individualism." Such an explicit announcement of what he was going to write about might have made less striking his arguments and illustrations; for these would then be serving merely to reveal that business men, or others who set chief store on preserving a business civilization, usually advocate a governmental policy—as to intervention or non-intervention—that is prevailingly favorable to business men. That, I believe, is all that Mr. Laski does validly show. He does that in the distinctive and brilliant style we look for in all his writings.

It should be noted, however, that for Marxists Mr. Laski has in this book done just what he set out to do: namely, to show that liberalism is always

the servant of capitalism. Some Marxists believe that he has done this so effectively that liberals can no longer be "unconscious" of the nature of their service. "From this time on", one reviewer exclaims, an avowal of liberalism "becomes the clear acceptance of the philosophy of business."

Mr. Laski has recently taken the position, in writing reviews of other books on political theory, that a record and interpretation of political ideas appears "flat" and "static" if the writer does not tie the whole work together by a single thread of historical interpretation: he cannot be "vivid" or "dynamic" until he has devoted himself to a single social (i.e., economic) creed. I believe that in this attitude on style Mr. Laski may be over-rating the literary capacities of the writers whose style he criticizes, and under-rating his own. If the writers have appeared flat and colorless, they would probably show up about as badly in attempts at more partisan exposition. And Laski, I believe, would still be dynamic and vivid, even if he should make a serious effort at objectivity.

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CASES AND OTHER MATERIALS ON CONFLICT OF LAWS. By Elliott E. Cheatham,[1] Noel T. Dowling,[2] and Herbert F. Goodrich.[3] Chicago: The Foundation Press, Inc., 1936. Pp. xliv, 1148. $7.00.

CASES AND MATERIALS ON CONFLICT OF LAWS. By Charles Wendell Carnahan.[4] Rochester: The Lawyers Co-operative Publishing Company, 1935. Pp. xiii, 1142. $6.50.

I AM going to risk that chronic complaint against the book reviewer—that he writes not about the book he is reviewing but upon whatever ideas happen to pop into his head while leafing through the volume he has obtained under false pretenses. But who wants a description of a casebook—and, *a fortiori*, two casebooks? Certainly not the teachers in the field. If they have been so delinquent in the discharge of their professional duties as not already to have acquired copies of both books, they should resort forthwith to the publishers, not to the book review departments. Let them count the cases decided since 1900 themselves. As for those others who are so addicted to the reading of book reviews that they cannot resist even the review of two casebooks outside their pedagogical jurisdictions, surely they can have no complaint if what is contained herein should prove broader in its implications than the two books in question. And if what eventuates is not a review of those books but an essay upon the occasion of their publication, that is a matter which

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the responsible editor of this journal must justify to his board and to his own conscience.

The problems in the Conflict of Laws which remain open are not very consequential from a social standpoint. I except only those relating to divorce. Obviously we must have rules to govern place of trial and the recognition of foreign judgments, and rules—or principles—or a technique—for choosing between competing laws. But only obduracy in self-stultification could have prevented courts, legislatures and lawyers from devising reasonably adequate procedures to cope with these problems; and, while their work has left room for improvement, the evils to be extirpated are not comparable to those persisting in fields which exercise less fascination upon the legal scholar.

Nor do Conflict of Laws problems bulk very large in the lawyer's practice. Doubtless few attorneys escape some contact with knotty questions in this field, but there are half a dozen or more branches of the law within the range of courses comprising the third year curriculum which contribute more grist to the lawyer's mill. The champion of the importance of the Conflict of Laws in the law school curriculum is hard put to establish it as "practical" unless he is adept in the devices of the late G. K. Chesterton.

Despite these considerations, the Conflict of Laws is one of the major courses from the standpoints of hours allotted and of student attendance in the third year law curriculum in most law schools, that third year which is crowded with courses important in one or both of the respects in which Conflicts is deficient. It seems to me that to encourage, indeed, to justify, the attention which Conflicts is receiving, the teacher must be prepared to make a contribution more significant than the familiarization of his students with the body of law created by court and legislature in that field. And it is with reference to this pedagogical problem that I think any Conflicts casebook must be evaluated.

If one seeks an explanation of the academic eminence of Conflicts, I think he will find it in the fact that in its doctrine there has developed a jurisprudence more conscious, more comprehensive, and, in the actual decision of cases, more consequential than is to be found in any other branch of the common law. The student has stepped from the welter of narrow issues, historical anomalies, and practical compromises into a loftier, purer realm wherein the rules which he has sought to assay in other courses of study emerge refined of the dross that had troubled him there. He has been guided to an inquiry into the nature of these rules and led to extend or delimit their application to particular cases in accordance with the dictates of a coherent body of doctrine, brushing aside the aberrations of misguided courts. It is exhilarating to swing from torts to contracts to property ("immovable" and "movable", not just "real" and "personal") and thence to the assorted status, dipping, en route, into such esoterica as *renvoi* and the doctrine of qualifications.

Moreover, the insinuation of the serpent of Realism into this intellectual Eden has enhanced, rather than diminished, its attractions. For the Conflicts scholar who tastes of the heady fruit of the Tree of Newer Knowledge

is not cast out, as is his confrère in Sales and Mortgages, to delve by the sweat of his brow for Facts. Instead, he can bask in the shade of the Tree, coining incantations to exorcise conceptual sorceries. Without stirring a hand, he can divest A of a right created by the law of State X, and, presto! create in A a right by the law of State F which is every bit as good as the old one. Or he can deplore the plight of parties enmeshed in the gears of a mechanical jurisprudence and invoke a *frei Rechtsfindung* guided by unspecified social and economic insights.[5] When the hour comes for this scholar to turn to teaching, he then can season the problems of conflicting laws with the polemics of the conflicting doctors.

Where, in this happy state of things, lurks the problem? The problem, I submit, lies in the fact that philosophical tidbits which make Conflicts tasty to the student are not alone sufficient to justify so large a place for the course in his third year dietary. If this place is to be justified, it should be because the course compels the student to chew the conceptualist's theory and the realist's conceptions down to the bare bones and gristle. He won't derive much informational nourishment from the fare, but he'll toughen his mental mandibles.

And this, at long last, leads to casebooks, for it is the casebook editor who determines in large measure what is to be proffered the student. Now the editor's publisher is conscious of the desires and digestions of a diversity of teachers and students. If the editor were to compile a casebook *a thèse,* he would probably find that his theses, pedagogical and juristic, did not correspond to those entertained by many of his peers. For very practical reasons, fortified often by his own convictions, he therefore adopts the cafeteria plan. He spreads something of everything on display.

To attempt to bolt all the available dishes in the sixty or forty-five hours comprising a Conflicts course will produce either acute mental indigestion or intellectual flatulence, depending on whether the food is served raw or in the spoon. Most teachers don't try to oblige their students to do this, or, if they do, fortunately they fail in the attempt. They select or have selection forced upon them. But if they feel, with me, that informational content is of relatively small consequence in this course and wish to concentrate on the kind of fare which I have prescribed above, they will have to go outside the casebook. This can be done, of course, with a small class, but it just doesn't work well. It reduces to a minimum the opportunity for selection and pruning, the provocative juxtaposition of dogma and heresy, and the use of other such devices for the pointing of inquiry. Moreover, there is not the assurance of timely reading when the material assigned is on the library shelves and not in the casebook.

Professors Cheatham and Dowling and Dean Goodrich are aware of the importance of those aspects of the Conflicts problems to which I attach so high a value, and they have endeavored, without sacrificing coverage, to give them emphasis. This is done, directly, by the use of text statements introductory to various sections, by brief excerpts from law review articles and treatises and, indirectly, by arrangement and annotation. Though a compromise, I think their work in this respect represents an important step

5. *Peccavi!*

forward. But, wilfully, I cannot refrain from wishing that they had called in one more collaborator, Professor Stumberg, whose treatise for students has just been published by the same press. If a few hundred pages of case material had been excised to make way for fifty pages of Professor Stumberg's text, room would have been made for more material of the sort that seems to me essential if Conflicts is to be the rigorous discipline that it can and should be.

Professor Carnahan has been more daring. Distinctly his is a casebook *à thèse,* and his thesis is primarily a pedagogical one. Implicit in the organization of his book is the bold assumption that a third-year student may be expected to go into a Conflicts class knowing more about the subject for the day's discussion than he is likely to know at the end of a class for which he has prepared in the usual manner. Under each topic (and he has covered them all), he has brought together some of the principal writings on the subject (entire law review articles and substantial excerpts from articles, treatises, and the Restatement). Then comes a group of cases, a shorter selection, of course, than is customary. Finally follows a group of problem cases (digests of actual decisions) upon which, after perhaps a preliminary hour or so of discussion, attention is to be focussed.

It is not to be supposed that this will make the student's task easier. Indeed, it is the demands which the method makes upon the student's time and the instructor's ingenuity that give rise to my principal doubts concerning his experiment. But I am confident that, given an instructor who will realize that this book will require a new teaching technique and who will make the exertion necessary for its mastery, and, given students who sincerely desire that diversification in instructional method, the lack of which it has become habitual for the third year student to deplore, then the use of this book will yield fruits which will abundantly repay the effort exacted of both parties. I must add, however, that Professor Carnahan's interest does not seem to have been pointed to the type of problem which I feel is deserving of chief emphasis. His materials, nevertheless, contain much that would aid in such a development of the course.

One word more, to testify that, although a delinquent reviewer, I am not without compunction. Had I taken occasion to describe the work of the triumvirate from Columbia and Pennsylvania, I think I could have demonstrated what everyone who knows its editors will assume: that it is a thoughtful, ingenious, carefully edited, and scholarly work. Moreover, I can offer testimony more convincing than a compliment: I used the book one year in its mimeographed form and I am using it now. Despite this public yearning after my private moon, I like the new book. And some day, when my available time is equal to my interest, I hope to follow Professor Carnahan in his interesting experiment. It might, I think, prove wholesome for law teaching generally if others were to do likewise.

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THE KING AND HIS DOMINION GOVERNORS. By the Hon. Mr. Justice Herbert Vere Evatt. London: Oxford University Press, 1936. Pp. xi, 324. $5.00.

THIS IMPORTANT book, by one of the Justices of the High Court of Australia, may be described as an essay on the ambiguities of British constitutional conventions.

The dynamic factor in British constitutional growth has been the process of gradual participation in the exercise of Crown powers by one section of the community after another. Thus in the course of centuries these powers have one by one become defined, specialised, and then institutionalised. But always there has remained the concept of "reserve powers" inherent in the Crown: powers, that is to say, which have *not* become accurately defined and institutionalised. And even though the area of these powers has been drastically curtailed since the time of the Tudors, some such powers have been allowed to remain. Nevertheless, in the last two centuries custom has come to determine the way in which they should be utilised. And with the extension of self-government to the colonies in the nineteenth and twentieth centuries there has come the transfer of this same fundamental constitutional situation to each of the Dominions. At the heart of all these constitutional organisms there lie the uninstitutionalised reserves of Crown power.

It is the main contention of Mr. Justice Evatt that these reserve powers are now leading to a serious constitutional situation wherever they obtain: and that because of the uncertainty surrounding them. It is true, he admits, that convention has more or less satisfactorily regulated their exercise in the past. But he maintains that this has been due not to any adequacy in the conventions themselves but rather to the fact that they operated in peculiarly favourable circumstances; in particular, the existence of a fairly stable two-party system and the tacit acceptance by both parties of basic economic postulates. Now, however, he contends, with the multiplication of parties and with the calling into question of economic fundamentals by one or more of those parties, the unsatisfactory nature of the old conventions is increasingly being revealed.

"It is often impossible to tell", says the author, "whether the conventions are being obeyed, because no one can say with sufficient certainty what the conventions are." And he stresses five major questions in particular, the answers to all of which are so far from being certain that eminent constitutionalists—as well as Dominion Governors themselves—may be found giving incompatible answers. These five problems we may roughly formulate as follows: In what circumstances may the King (or his representative) refuse to his ministers a dissolution of Parliament when they ask for one? Can the Crown representative dismiss a ministry which still retains the confidence of the popular Assembly, even though that Assembly may patently be misrepresenting public opinion on some grave issue which may have arisen since its election, or may be flagrantly violating its electoral programme and pledges? In what circumstances may the Crown make additions to the Upper Chamber (where, of course, the Constitution allows for such additions) in order to ensure the passage of a Bill desired by the Lower House? Does the Crown still retain the prerogative of being able to veto legislation, and what

circumstances would warrant such a veto? And lastly, what precisely is the relation subsisting between a Prime Minister and his Cabinet, and between both these and the Crown: for example, if the Premier turns against his Cabinet and his party, is the King (or his representative) bound to act on the advice of the former alone?

Mr. Justice Evatt has discussed these matters with a wealth of learning and with a knack of vivid citation. The argument is in no sense merely speculative for the case method is used throughout. Some twenty "crises" within the British Commonwealth (most of them from the past twenty-five years) are narrated and analysed in detail, each of them involving one or more of the ambiguities set forth above. The burden of the argument is that, just as the whole evolution of the British Constitution has proceeded by way of defining and institutionalising Crown powers as necessity arose, so in the face of new necessities the time has come to define some of the remaining reserve powers if chaos is to be avoided. It is not that the author pleads for the elimination of these powers; quite the contrary: "it is plain that, upon certain occasions, the failure of the Sovereign or his representative to protect the people against acts of tyranny or usurpation on the part of Government and Parliament may be just as detrimental to the true interests of the Crown, although the prerogative is *not* exercised, as its exercise may be upon other occasions." Two things therefore must be done. First, the reserve powers must be defined and reduced to rules of positive law enacted by the competent parliament of each of the constitutional units of the Commonwealth (just as, for example, the relationship between the House of Commons and the House of Lords was fixed by the Parliament Act of 1911). Second, the interpretation and maintenance of these rules "would then normally become the function of some competent tribunal, judicial or arbitral." What is required by the Crown and its representatives, in other words, is a position where their exercise of great prerogative powers is controlled and regulated by general principles openly stated, and applied with complete indifference to the welfare or detriment of particular parties or interests. Only thus can the elimination be secured of those grave personal responsibilities involved in the present exercise of reserve powers by the King and (to an even greater degree) by his Dominion representatives: and only so can the King continue to be kept "out of politics."

Mr. Justice Evatt's analysis is impressive, and certainly disturbing. He brings out forcibly the gravity of the problems under discussion and shows clearly the dangers that may be incurred by the British democracies if these ambiguities in their fundamental constitutional conventions are not satisfactorily resolved. And who that is mindful of the post-war constitutional history of Europe can gainsay the urgency of the task? In the light of this analysis one can do no other than assent to the observation of Dean K. H. Bailey, of the Faculty of Law in the University of Melbourne, who in the course of his felicitous introduction to this book says that, inasmuch as the very fate of a constitution during periods of stress may depend on the adequacy of the provisions it makes for emergency powers, "it is not too much to say that the whole future of the British constitutional system is likely to depend on the extent to which, in the next few years, it is demonstrated that the reserve

powers of the Crown are not the antithesis but the corollary of the democratic principle that political authority is derived from the people."

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THE SALE OF FOOD AND DRINK. By Harry C. W. Melick.[1] New York: Prentice-Hall, Inc., 1936. Pp. xlii, 346. $5.00.

The present volume is announced in its preface as an effort to save the time of the busy practitioner who has to advise on cases growing out of the sale of food and drink.

The book consists of thirteen chapters. One of these is devoted to a survey of the historical origins of the law bearing on this topic. Ten chapters are devoted to various aspects and applications of implied warranty of quality. One separate chapter is devoted to negligence, and another to the question of damages. The book sets forth in considerable detail many of the reported cases, while citing in addition many other cases and other reference materials. Where a considerable number of decisions on various points have accumulated in certain jurisdictions the book collects them, grouped according to jurisdictions arranged in alphabetical order. In the appendix are certain historically important early statutes, and certain pertinent reports from the year books not otherwise commonly available. The table of contents is so elaborate that it covers eleven pages. The index by itself covers twenty-eight pages. It may thus be observed that the book opens the way to a great mass of potentially applicable legal materials. Its mechanical arrangements, furthermore, are such that the searcher for information may readily find some lead or other that may guide him to certain particular details which he may want to investigate.

While I appreciate the convenience with which this book makes the authoritative materials available for investigation, I am disappointed at its apparent lack of thorough analysis of the underlying bases for liability. The problems to be analyzed and solved in food cases are much broader than the familiar sale transaction. Distribution of food products from original producer to ultimate consumer in present-day marketing practice terminates in various ways. Not only is food sold in grocery stores, but ultimate consumers of food and drink are also provided for in hotels and restaurants as well as at ice cream parlors, soda fountains and similar establishments. These establishments, again, may be operated independently, or they may be found in connection with drug stores, department stores or other business undertakings. The exact details of these marketing channels for food products, moreover, are continually undergoing readjustment. Practical experimentation is always going on in the quest for the business combination that under the particular circumstances encountered in the instance will for the time being prove the most suitable. Food products are thus actually distributed to ulti-

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mate consumers through a considerable number of continually varying marketing methods. Through any one of these injury to ultimate consumers from unwholesome food products may on occasion come about. Such injury may affect many individuals in the instance completely outside the range of the familiar relations of buyer and seller.

Within the familiar relations of buyer and seller liability for injury resulting from unwholesome food is readily explained in terms of the well-known obligations of implied warranty. Outside of such relations, liability for such injury is equally familiarly derived from facts involving negligence, a field on the application of which in this regard, however, the authorities are sharply conflicting. Beyond these limits, moreover, where the facts do not indicate negligent conduct, and at the same time the parties do not stand in the relations of buyer and seller, the problem of finding some rational basis for liability having the actual support of legal authority presents more difficulty and complication. Can remote purchasers or users thus injured obtain redress? Can patrons of restaurants and similar establishments, if injured without negligence, obtain redress? As viewed through the terminology of sales law, how far, if at all, can implied warranty obligations be made available to injured parties not standing in the immediate relations of buyer and seller? As viewed through the terminology of tort law, how far, if at all, can redress based upon absolute liability be had from non-negligent distributors whose conduct in marketing unwholesome food products has caused the damage in question? Is applying the obligations of implied warranty to parties not standing in the relations of buyer and seller equivalent to applying absolute liability for damage done? In present-day marketing practice, when injuries occasioned by unwholesome food are involved, fundamental questions such as these are encountered.

This book impresses me as making only a rudimentary beginning toward the analysis and solution of the questions which underlie most of the detailed problems discussed. Although judicial decisions and available statutes are exhaustively cited, and many of them are briefly reviewed, and ten chapters, by far the largest part of the book, are devoted to detailed applications of implied warranty, the author fails squarely to face or adequately to analyze the widely ramifying question as to whether implied warranty obligations are necessarily promissory in nature and accordingly rest on contractual grounds. Here and there throughout the book appear statements indicating positive realization that implied warranties may go beyond contractual intention to be bound, in that such obligations may be imposed by law by reason of representations not in fact true but relied on by the other party to the transaction. Where the parallel to absolute liability is noticed, however, neither is it analyzed nor the bases in policy for its application identified. Instead, it is merely attributed to the early statutes on the subject. The book manifests no realization that the obligations familiarly called by the name of implied warranties may on the basis of policy be imposed by law as an imposed standard of conduct quite independently of either promises or representations of the parties in the instance. It shows but little if any realization that liability by virtue of such implied warranties is broadly analogous to the growing doctrine of absolute liability involved in many portions of the law of torts.

Two of the most conspicuous instances of the limited conception of the book may suffice for illustration. One of these is the question of recovery by a remote third party, as injured consumer, against the original manufacturer of the injurious food product with whom the injured party had no contractual relations. After discussing this situation from various angles the book finally adopts as sound analysis and commends as a workable basis for liability the position which regards the manufacturer's implied warranty to his immediate purchaser as being conferred for the benefit of the ultimate consumer. This reasoning, invoking the contract beneficiary doctrine to support liability to the remote purchaser, manifestly is derived from the underlying misconception that warranty obligations necessarily are contractual in nature. The fact is, however, that in such cases the seller neither promised nor intended to be bound to the ultimate purchaser. Invoking the contract beneficiary doctrine under such circumstances manifestly is bald fiction, resorted to for sustaining liability to a remote injured party for damages done irrespective of contract or fault. Similar remark, of course, may be made on the alternative form of speech sometimes employed in such cases, that the original seller's implied warranty to his immediate purchaser runs to subsequent parties on the analogy of covenants running with the land. In all these cases, manifestly, behind these forms of speech is a question on the merits which needs analysis. That question is whether and how far in such cases considerations of policy call for liability for damage caused irrespective of contract or fault.

Another phase of Mr. Melick's argument which raises questions is his discussion of the restaurant keeper's liability. Restaurant keepers are of course liable for damages due to negligence in their service of food. That restaurant keepers are not liable beyond negligence has been assumed in many courts. The statutory material presented in this book affords demonstration that such assumption is historically unsound. That such assumption is also logically unsound is equally demonstrable, in that it fails to take into account certain elements calling for absolute liability that are involved in the facts of restaurant cases. This book, however, does not attempt to make that demonstration. It seems at this point again not to have shaken off entirely the erroneous belief that implied warranty is necessarily contractual in its nature. It devotes a great deal of effort to prove that service of food in restaurants is both historically and logically to be classified as a sale, seeking through that form of speech to justify the application of the familiar law of implied warranty in sales also to restaurant keepers. To the present reviewer such rationalization, though supported by occasional authority, seems artificial and futile. It would seem to be much simpler, as well as much closer both to the historical analysis and to the practical facts, to recognize that so-called warranty obligations are not confined to sale transactions. They do not even depend on finding in the instance a contractual element on which to rest. They may be independently imposed by law by reason of considerations of policy. In that view, too, the important further question should be faced of whether liability in restaurant cases, if going beyond the basis of negligence, may in the aggregate do more harm than good on account of its encouragement to spurious claims.

This book conveniently sets out or points the way to a great repository of authoritative but confused and conflicting legal materials in a field of uncertain limits where underlying considerations are complex and sharply conflicting. So far, so good. Much more effective for practical purposes it could have been, however, had it been stronger on the side of analysis, pointing out the guiding considerations involved in the practical application of those legal materials.

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HISTORY OF LABOR IN THE UNITED STATES, 1896–1932, VOL. III: Working Conditions by Don D. Lescohier;[1] Labor Legislation by Elizabeth Brandeis.[2] New York: Macmillan, 1935. Pp. xxx, 778. $4.50.

MORE than twenty-five years ago, the Carnegie Institution of Washington launched an elaborate plan by which the economic history of the United States was to be divided into twelve fields, within each of which a comprehensive treatise was to be prepared by competent scholars. Responsibility for the section dealing with the history of labor, initially in charge of Carroll D. Wright, was assumed in 1909 by Professor John R. Commons of the University of Wisconsin. Following friction between the Carnegie Institution and its Department of Economics and Sociology, volumes one and two of the History of Labor in the United States, written by John R. Commons and six associates, appeared in 1918 under the auspices of the Board of Research Associates in American Economic History. These two volumes, which brought the labor history of the United States up to 1896, were well received in academic circles. Though they suffered considerably from the absence of an adequate interpretation of the growth of the labor movement, they served as excellent reference books covering obscure periods in our labor history.

The present volume aims to carry on the work launched by Professor Commons. It brings the story of labor legislation and of working conditions of labor down to the year 1932. Trade union developments, 1896–1932, are reserved for volume four, which also appeared in 1935. The treatment of working conditions and of labor legislation in volume three is only moderately successful. Its thirty chapters are of differing qualities. The topics treated range from population and immigration problems to wage questions, public works programs, issues of unemployment relief and unemployment insurance, employers' welfare schemes, and the several brands of labor legislation. These materials are not integrated save through a rambling but most interesting foreword to the volume, prepared by Professor Commons, in which he sets forth with characteristic vigor a somewhat unconvincing vindication of the class-collaboration policies of A. F. of L. unionism. Indeed, one feels that the

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material is of the sort one would find, frequently in better form, under the topic headings in the Encyclopaedia of the Social Sciences. The sections on employee representation and company policies are especially incomplete and reflect both an underestimation of the importance of company unions and an underappraisal of the other techniques by which employers have sought to check the expansion of trade unionism.

The sections on labor legislation, prepared by Elizabeth Brandeis, show a commendable thoroughness but, like the rest of the book, go little beyond a mass of specific quotations of experiences in the several states, court decisions, and administrative efforts. We get no adequate glimpse of the forces brought to bear, for or against most of the measures, or the defects in the capitalistic system which necessitated the resort to additional state action.

One may interpret this book as being a representative product of the Wisconsin group which for so long was given vitality by Professor Commons. For thirty years, his students were nurtured on a belief in a "balanced capitalism". Their plea for progressive labor legislation and for the business unionism of the American Federation of Labor type gained for them a considerable following as sponsors of a pleasing substitute for the Marxian economic doctrines prevalent in European labor circles. The increasing trend toward radicalism in labor movements both here and abroad, suggests, however, that class forces may be more powerful than Professor Commons' students have believed.

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